UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Miscellaneous Action No. 18-mc-51358

Criminal Action No. 17-cr-20274

Hon. Bernard A. Friedman
Mag. David R. Grand

United States of America,

Plaintiff,

v.

Jumana Nagarwala, *et al.*,

Defendants.

BRIEF OF *AMICUS CURIAE* AHA FOUNDATION IN SUPPORT OF THE UNITED STATES OF AMERICA

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PRELIMINARY STATEMENT

Female genital mutilation ("FGM") is a human rights abuse that has victimized over 200 million women worldwide.[1] Although FGM is mostly confined to Africa, the Middle East and Asia, as this case demonstrates, this brutal practice has achieved a global reach. In recognition of this fact, in 1996, Congress enacted 18 U.S.C. § 116 ("Section 116") so that the United States could do its part to eradicate FGM. Yet Section 116 lay virtually dormant for 20 years, until this case broke new ground as the first prosecution ever brought directly under that statute. It is in just such novel circumstances that courts most need the assistance of an *amicus curiae* to "bring to the attention of the Court relevant matter . . . [that] may be of considerable help to the Court." Fed. R. App. P. 37. And no one knows the facts of FGM better than proposed *amicus curiae* AHA Foundation.

Ayaan Hirsi Ali, the founder of proposed *amicus curiae*, is herself a survivor of FGM. This brave woman has triumphed over personal tragedy to develop a globally-renowned voice that fights for the rights of women and draws attention to the inhumane practice of FGM. She therefore applauds Congress for criminalizing FGM where too many states have failed to do so, and the prosecutors in this case for combatting FGM where too many others have failed to act.[2] In light of the historic nature of this case, proposed *amicus curiae* respectfully seeks to assist the Court by providing facts and information about FGM demonstrating that Congress acted within its constitutional powers in enacting Section 116.

First, Section 116 falls squarely within Congress's power to regulate interstate commerce. FGM is an inherently commercial act. Data show that in most cases, FGM, like any other medical procedure, is bought and paid for. Not only that, but for many communities that practice FGM, FGM is not just a commercial transaction but an investment, as it is used to increase the "bride price" of its victims. Additionally, in many cases (including this one), FGM is an interstate activity, involving the trafficking of young girls across state, country and even continental lines. Even in cases where FGM does not cross state lines or involve the exchange of money for services, it has an impact on interstate commerce that Congress is empowered to regulate.

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[1] FGM is also commonly referred to as "FGM/C," where the "C" stands for "cutting."

[2] About half of all states do not have laws criminalizing FGM. Michigan only adopted its anti-FGM law in 2017, after this case was initiated. *See* http://globalwomanpeacefoundation.org/2018/01/16/does-your-state-have-a-law-against-fgm/

Second, Congress was authorized to pass Section 116 pursuant to its constitutional power to implement the international obligations enshrined in anti-slavery and anti-discrimination treaties signed by the President and ratified by the Senate. FGM is a practice "similar to slavery." Among other things, FGM treats women like chattel, it brands them as property of their husbands and it deprives them of their sexual freedom. These effects are all "badges and incidents of slavery" that subjugate women. Moreover, the International Covenant on Civil and Political Rights of 1976 ("ICCPR") directs Congress to take federal action to ban sex-based violence like FGM. That is exactly what Section 116 does.

For these reasons, the Court should hold that Congress had the constitutional authority to enact Section 116, deny *Defendants' Motion to Dismiss Counts One, Two, Three, Four and Five of the Indictment* (D.I. 307) and grant long-deferred justice to Defendants' victims.

FACTS ABOUT FGM

I. FGM is a global scourge not confined to any one region or religion.

The World Health Organization ("WHO") defines FGM as an array of "procedures that intentionally alter or cause injury to the female genital organs for non-medical reasons."[3] According to WHO, there are four types of FGM:[4]

- Type 1 (often referred to as "clitoridectomy"): The partial or total removal of the clitoris or, in rare cases, only the prepuce (the fold of skin surrounding the clitoris).
- Type 2 (often referred to as "excision"): The partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora.
- Type 3 (often referred to as "infibulation"): The narrowing of the vaginal opening through the creation of a covering seal formed by cutting and repositioning the labia minora, or labia majora, sometimes through stitching, with or without removal of the clitoris.[5]
- Type 4: All other harmful procedures to the female genitalia for non-medical purposes, such as pricking, piercing, incising, scraping and cauterizing the genital area.

As one would expect of a procedure whose practice spans the globe, the reasons for inflicting FGM are manifold.[6] Some communities practice FGM out of a respect for tradition or as a social convention. Others treat it as a rite of passage for prepubescent girls. Still others mistakenly believe that FGM somehow enhances fertility. Many communities see FGM as key to marriageability, as they believe it ensures virginity, chastity and faithfulness.[7] And for some

[3] http://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation.

[4] *Id.*

[5] Victims of infibulation must often undergo "deinfibulation," *i.e.*, the surgical re-opening of the sealed vaginal orifice, to return such basic functions as menstruation, intercourse and childbirth.

[6] These and other reasons, as assessed by WHO, are provided at http://www.who.int/reproductivehealth/publications/health-care-girls-women-living-with-FGM/en/

[7] As WHO found, "There is often an expectation that men will marry only women who have undergone FGM. The desire and pressure to be married, and the economic and social security that may come with marriage, can perpetuate the practice in some settings." http://apps.who.int/iris/bitstream/handle/10665/272429/9789241513913-eng.pdf?ua=1.

communities, such as the Dawoodi Bohra, of which Defendants are members, FGM is a matter of religious practice.

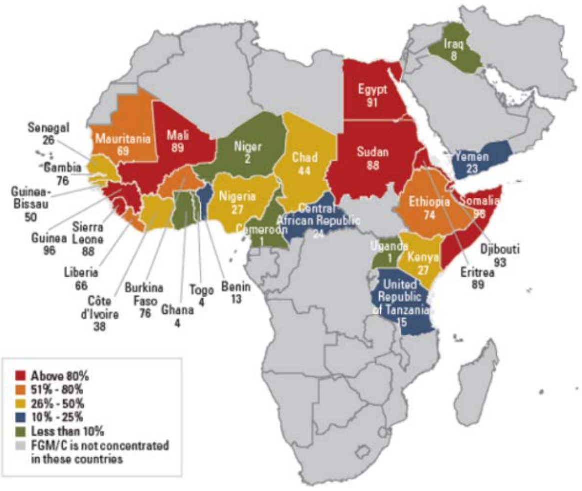
Yet despite popular conceptions, FGM is not confined to any one region or religion. Rather, UNICEF estimates that there are more than 200 million girls and women[8] alive today in about 30 countries who have been victims of FGM.[9] As reflected in the below table and map, the vast majority of these victims—though by no means all—are located in Africa, Asia and the Middle East.

Top 10 Countries of Origin

	U.S. Women and Girls at Risk of FGM/C
All Countries of Origin	506,795
Egypt	109,205
Ethiopia	91,768
Somalia	75,537
Nigeria	40,932
Liberia	27,289
Sierra Leone	25,372
Sudan	20,455
Kenya	18,475
Eritrea	17,478
Guinea	10,302
Other Countries of Origin	69,981

Source: Population Reference Bureau. Estimates are subject to both sampling and nonsampling error.

Figure 2 - Percentage of girls and women aged 15 to 49 years who have undergone FGM, by country


Iraq 8
Egypt 91
Senegal 26
Mauritania 69
Mali 89
Niger 2
Chad 44
Sudan 88
Yemen 23
Gambia 76
Guinea-Bissau 50
Nigeria 27
Central African Republic 24
Ethiopia 74
Somalia 98
Sierra Leone 88
Guinea 96
Cameroon 1
Uganda 1
Kenya 27
Djibouti 93
Liberia 66
Eritrea 89
Burkina Faso 76
Togo 4
Benin 13
Côte d'Ivoire 38
Ghana 4
United Republic of Tanzania 15
Above 80%
51% - 80%
26% - 50%
10% - 25%
Less than 10%
FGM/C is not concentrated in these countries

Source : UNICEF, 2013

Though regionally concentrated, these countries reflect remarkable diversity. For example, Sudan and Mali are majority Muslim countries,[10] while Ethiopia[11] and Eritrea[12] are majority Christian countries. Egypt and Iraq are majority Arab, while Tanzania and Nigeria are populated by sub-Saharan Africans. The practice of FGM spans continents—from Guinea in west Africa to Iraq in Asia. Indeed, in certain Asian countries, such as Malaysia, approximately 93% of girls have reportedly undergone FGM.[13]

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[8] The ages of the victims of FGM vary, but FGM is usually performed between infancy and adolescence. http://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation

[9] https://www.unicef.org/media/files/FGMC_2016_brochure_final_UNICEF_SPREAD.pdf

[10] https://www.worldatlas.com/articles/islamic-countries-in-the-world.html.

[11] https://www.britannica.com/place/Ethiopia/Religion.

[12] https://www.state.gov/documents/organization/208358.pdf.

Thus, though Defendants in this case are Bohra Muslims (a religious community that hails from India), statistics prove that no one group or territory can lay claim to this practice. Rather, and tragically, FGM afflicts diverse races and religions all across the world.[14]

II. FGM inflicts lifelong physical, psychological and emotional trauma.

Regardless of where and by whom FGM is practiced, one fact remains consistent: FGM poses material health risks to its victims, and those risks only increase as the manner of FGM becomes more severe.[15] Short-term consequences can include pain, bleeding, fever, infections such as tetanus, problems healing, injury to surrounding genital tissue, and shock.[16] Long-term consequences can be worse: urinary problems (painful urination, urinary tract infections); vaginal problems (discharge, itching, bacterial vaginosis and other infections); menstrual problems (painful menstruation, difficulty in passing menstrual blood); scar tissue (including keloid); sexual problems (pain and decreased satisfaction from intercourse); increased risk of childbirth complications (delivery complications, bleeding, caesarean section) and newborn deaths.[17] Any of these effects, if not properly treated, can lead to the death of the FGM victim.[18]

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13 *See* https://www.aljazeera.com/news/asia-pacific/2015/03/female-genital-cutting-thailand-south-150309083458995.html

14 Nor is FGM merely a problem for the poor. In a survey of 385 female respondents from the Bohra community, 84% reported middle or upper-middle class incomes; 80% had suffered FGM. *See* https://sahiyo.files.wordpress.com/2018/04/sahiyo_02-06-18.pdf.

15 https://www.unicef.org/media/files/FGMC_2016_brochure_final_UNICEF_SPREAD.pdf

16 *Id.*

17 *Id.*

18 *Id.*

The physical harm of FGM is exacerbated by psychological complications, including low self-esteem, anxiety, depression, and post-traumatic stress disorder.[19] In fact, a 2017 study found that women and girls who have undergone FGM endure "excessive risk of suffering from negative psychosomatic consequences," loss of "sexual satisfaction"[20] and totalizing depression.[21] Further, a 2018 study found that "regardless of the level of the physical invasiveness, almost all women" who had experienced FGM "reported having felt intense fear and/or helplessness"—a trauma that endures for life.[22] While the more severe forms of mental damage tend to manifest in girls who have undergone FGM types one, two and three,[23] "[r]espondents who underwent a milder form of [FGM] also reported post-traumatic symptom[s]," leading to the inexorable conclusion that every form of FGM "is associated with chronic mental health problems, even many years after the event."[24]

Seeking to dismiss the evidence of FGM's physical and psychological damage, defenders of FGM often compare it to the common, harmless practice of male circumcision. But this comparison is misplaced.

As an initial matter, reputable organizations, such as the American Academy of Pediatrics, have come out in support of male circumcision, stating that "the health benefits of newborn male circumcision outweigh the risks[.]"[25] In contrast, as noted by WHO, FGM offers

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[19] *Id.*

[20] *Id.*

[21] Mohammad-Hoseein Biglu and Alireza Farnam. "Impact of Women Circumcision on Mental Health." 2017.

[22] Anke Kobach, Martina Ruf-Leuschner, Thomas Elbert. "Psychopathological sequelae of female genital mutilation and their neuroendocrinological associations." 2018.

[23] *Id.*

[24] Erick Vloeberghs, Anke van der Kwaak, Jeroen Knipscheer & Maria van den Muijsenbergh. "Coping and chronic psychosocial consequences of female genital mutilation in the Netherlands." 2011.

[25] http://pediatrics.aappublications.org/content/pediatrics/early/2012/08/22/peds.2012-1989.full.pdf

"[n]o health benefits, only harm," as it "involves removing and damaging healthy and normal female genital tissue, and interferes with the natural functions of girls' and women's bodies."[26] No reputable organization has claimed otherwise.[27] Nor is there any safe or harmless way to practice FGM. Although Type 4 (as discussed above) is the least physically invasive form of FGM, it can still have both physical and psychological repercussions.[28] Moreover, the pain and damage from the pin prick is impossible to measure.[29]

FGM is, therefore, in all its forms, an act of intentional physical and psychological violence against women, the harms of which are documented and real.

III. In the United States, the practice of FGM is proliferating.

According to the Center for Disease Control and Prevention, "Approximately 513,000 women and girls in the United States were at risk for [FGM] or its consequences in 2012,"— more than twice the CDC's estimate in 2000 and more than three times its estimate in 1990.[30] For girls younger than 18, since 1990, the CDC's estimate has more than quadrupled.[31]

While the estimated increase in incidents of FGM "was wholly a result of rapid growth in the number of immigrants from [FGM]-practicing countries living in the United States," most of the victims were second-generation Americans, *i.e.*, girls born to parents already living in this

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26 *Id.*

27 Additionally, unlike male circumcision, FGM is not prescribed by the texts of any of the world's major religions. For a discussion of the possible non-religious origins of FGM in majority Muslim communities, *see* https://med.virginia.edu/family-medicine/wp-content/uploads/sites/285/2017/01/Llamas-Paper.pdf.

28 https://www.gatestoneinstitute.org/10585/female-genital-mutilation-american-muslim (noting that "[t]he whole intent of [a clitoral prick] is ceremonially to desexualize women and place their bodies under patriarchal control."

29 *Id.*

30 https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Special%20Situations/fgmutilation.pdf

31 *Id.*

country.[32] Thus, the number of victims of FGM in the United States is growing rapidly, and those victims are, by and large, not immigrants but U.S. citizens.

These facts, taken together, mean that young girls, most of whom are U.S. citizens, are increasingly subjected to a practice that confers life-long physical, psychological and emotional trauma. It is in this context that Section 116 was enacted and the present case was brought.

STANDARD OF REVIEW

Where, as here, a facial challenge to a statute's constitutionality is mounted, courts must review the challenged statute with a "presumption of constitutionality in mind" because "[d]ue respect for the decisions of a coordinate branch of Government demands that [courts] invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000). Importantly, in conducting this analysis, a court must remember that "because [courts] never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). Thus, this Court need not refer solely to the constitutional bases for Section 116 referred to in the Congressional record. Rather, any legitimate constitutional basis that can support the statute must be accepted as grounds for finding the statute constitutional. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. at 315.[33]

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[32] https://www.prb.org/us-fgmc/

[33] It is nonetheless worth noting that in enacting Section 116, Congress relied on, among other things, the Commerce Clause and the Treaty Clause—the same sources of authority on which *amicus curiae* relies. *See* Pub. L. 104–208, div. C, title VI, § 645(a), Sept. 30, 1996, 110 Stat. 3009–708.

ARGUMENT

Congress derived the authority to enact Section 116 under at least two enumerated powers: the Congressional power to regulate interstate commerce, and Congress's power to legislate under the Treaty Clause.

As to interstate commerce, data demonstrate that FGM is a commercial practice in at least three regards: (i) cutters are typically paid for their services; (ii) even when not paid, the actions of cutters have a substantial effect on commerce; and (iii) the act of cutting is used to increase the "bride price" that girls can fetch at marriage. Moreover, FGM frequently involves travel, by both victims and cutters, across state, country and even continental borders.

As to the Treaty Clause, various conventions against slavery empower Congress to regulate FGM—an archetypal badge and incident of slavery. Moreover, the ICCPR explicitly contemplates legislation aimed at protecting women and children from abuse such as FGM, and directs Congress to take appropriate action in furtherance of this goal.

I. Because FGM is inextricably linked with interstate commerce, Congress was authorized to enact Section 116 under the Commerce Clause.

Among Congress's enumerated powers is the power to "regulate Commerce . . . among the several States." U.S. Const., art. I, § 8, cl. 3. In determining the constitutionality of a purported use of this power, a court must only be satisfied that there exists a "rational basis" to link the regulated activity and an effect on commerce. *Gonzalez v. Raich*, 545 U.S. 1, 22 (2005). This review is inherently deferential. *See United States v. Gregg*, 226 F.3d 253, 261 (3d Cir. 2000). Indeed, Congress need not demonstrate an actual link between the regulated activity and commerce. *Id.* Rather, as the Supreme Court re-affirmed in *United States v. Lopez*, 514 U.S. 549 (1995), the court must look beyond a particular defendant's actions to determine how the aggregate of such activities, of which the defendant's act is but one part, may affect interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942).

With these standards in mind, it is clear that Congress acted within its authority in enacting Section 116. Data show that FGM is an inherently commercial transaction involving the transportation of victims across state and country lines—the exact type of activity that the Commerce Clause empowers Congress to regulate.

A. FGM frequently involves the interstate trafficking of young girls.

As this case demonstrates, FGM frequently involves the involuntary, cross-border transportation of young girls. Here, the majority of victims were spirited across state lines—specifically, from Minnesota and Illinois to Michigan—to be cut by Defendants.[34] This case is not atypical. Sufficient data have been gathered to demonstrate that in many cases, if not most, FGM involves the interstate, inter-country and even intercontinental transportation of victims.

This phenomenon is so common that it has given rise to the term "vacation cutting," a phrase popularized by the United Nations Population Fund (the "UNFPA")[35] in reference to the prevalence of young girls being transported abroad during school holidays to undergo FGM. The UNFPA notes that "July, August and September are something of a 'cutting season' for many girls around the world, when the break from school means they have time to undergo, and recover from, FGM."[36] But the school break affords girls time not only for the surgery and recovery, but also for "travel from abroad to undergo the procedure." This data is corroborated by UNFPA specialist Ahmed Jama, who notes that "girls travel from the West and from Djibouti

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34 *See Third Superseding Indictment*, D.I. 334.

35 Formerly the "United Nations Fund for Population Activities," the organization has kept its acronym.

36 https://www.unfpa.org/cuttingseason.

to be cut" in Somalia. A cutter in Africa confirms this statement, asserting that her "peak season" is July and August, "when parents bring their children to be cut."[37]

These parents are coming from, among other places, the United States—a fact well known to U.S. authorities. For this reason, in June 2018, U.S. Immigration and Customs Enforcement (ICE) launched a special program specifically aimed at combatting vacation cutting. Called "Operation Limelight" and designed after a similar UK program, the initiative started at New York's John F. Kennedy International Airport and has since expanded to at least 10 other cities with large international airports—the channels to the foreign countries where FGM is performed.[38] In ICE's words, the program is "designed to bring awareness to [FGM] and prevent young girls from being subjected to FGM."[39] Specifically, "[t]he initiative aims to inform passengers traveling to high-prevalence countries about the U.S. laws governing FGM and the potential criminal, immigration, and child protective consequences of transporting a child to another country for the purpose of FGM."[40] There is no question among U.S. law enforcement, therefore, that FGM frequently involves interstate travel.

Moreover, as with any commercial transaction, it is not only the victims/purchasers who travel for FGM: the cutters/providers travel as well. The Intelligence Operations and Analysis Division of the Canada Border Services Agency (the "CBSA"), the Canadian analogue to ICE, has confirmed that cutters frequently come to Canada from abroad.[41] The CBSA has further found that "[o]nce in Canada, the practitioners are typically called into homes to perform the

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37 *See also* http://www.chicagotribune.com/lifestyles/health/ct-genital-cutting-chicago-met-20170612-story.html (noting that the most frequent cases of FGM seen in the United States involve girls who were either cut before they moved here or "while they were sent abroad—often called 'vacation cutting.'"

38 https://www.ice.gov/news/releases/ice-leads-effort-prevent-female-genital-mutilation-newark-airport

39 *Id.*

40 https://www.ice.gov/news/releases/ice-pilots-fgm-outreach-program-jfk-airport

41 https://globalnews.ca/news/3602227/female-genital-mutilation-canada-border-officers-warned/

procedures . . . us[ing] razor blades, shards of glass, strips for binding legs as well as ash, oil and herbal mixtures."[42] They come, in other words, prepared to perform FGM.

The interstate aspect of FGM is further confirmed by Mariya Taher, a co-founder of the anti-FGM non-profit Sahiyo and, like Defendants, a member of the Dawoodi Bohra community. Taher underwent vacation cutting when her parents took her to India as a child.[43] Her sister, however, underwent FGM in the United States.[44] As the data and Taher's anecdotal experience show, the interstate travel involved with FGM is so pervasive as to flow in both directions.

Finally, regulation of FGM, or lack thereof, inevitably affects the extent to which vacation cutting and related interstate commerce takes place. It therefore falls within the Commerce Clause's purview. *See Gonzalez v. Raich*, 545 U.S. at 22.

B. FGM is an inherently commercial practice.

In addition to the interstate aspect of FGM, in several key ways, FGM is inextricably intertwined with commerce.

First and most obviously, as one would expect of any surgical procedure, FGM is a commercial transaction generally bought and paid for. This is especially so in cases requiring cutters to travel. FGM experts say that families often "pool resources to bring in a cutter from abroad to mutilate girls in groups," which requires the families to "raise the funding to pay for

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42 https://globalnews.ca/news/3602227/female-genital-mutilation-canada-border-officers-warned/

43 https://abcnews.go.com/US/underground-american-woman-underwent-female-genital-mutilation-forward/story?id=39728421

44 *Id.*

someone to come from overseas."[45] Even when travel is not involved, cutters acknowledge that cutting is their livelihood, and have spoken frankly about the income cutting generates.[46]

FGM is also linked to commerce in one further insidious way: as a means of increasing the money received by victims' families upon marriage. This is not an incidental feature. In many communities, custom dictates that the parents of the bride receive a "bride price," *i.e.*, a payment in exchange for their daughters, upon marriage. And the benefit that FGM can offer in increasing a daughter's "bride price" is a crucial incentive to subject her to FGM.

The data bear witness to this phenomenon. As reported in a 2013 study, some communities perform FGM as "a pre-condition for marriage" because circumcised girls are more marriageable and attract better bride prices[.]"[47] For example, in Kenya, "a dowry is paid by the groom's family . . . [so] girls are seen as a valuable asset to their families, if they can be offered for marriage in the 'right' condition," *i.e.*, having been cut.[48] The same is true in Ethiopia, where families report worrying that uncut daughters will never become marriageable.[49] From this data, experts have concluded that "[f]emale genital mutilation [is] an economic transaction as much as a cultural tradition."[50]

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[45] https://www.theguardian.com/society/2014/feb/06/female-genital-mutilation-foreign-crime-common-uk

[46] https://www.theguardian.com/society/2014/feb/07/female-genital-mutilation-kenya-daughters-fgm. *See also* https://www.cnn.com/2017/12/04/opinions/stopping-female-genital-mutilation-opinion-lemmon/index.html (noting that cutting in Tanzania pays "30,000 Tanzanian shillings (roughly $14) [per] girl."

[47] https://www.younglives.org.uk/sites/www.younglives.org.uk/files/YL-WP93_Boyden.pdf.

[48] https://www.theguardian.com/society/2014/feb/07/female-genital-mutilation-kenya-daughters-fgm

[49] https://www.worldvision.org.uk/files/4814/0068/7160/Exploring_the_links_FGM_cutting_and_early_marriage.pdf

[50] *See* https://www.cnn.com/2017/12/04/opinions/stopping-female-genital-mutilation-opinion-lemmon/index.html; *see also id.* (quoting Seleiman Bishagazi, the chairman of Kipunguni Knowledge Center, as stating that families "us[e] FGM as a source of income because people would say, 'I will build a house after my daughter goes through this' . . . They were using girls as capital." *See also* the World Vision study referenced above (finding that "[p]arents will procure [FGM] for their young daughters to enhance their marriageability").

Even when FGM is not paid for, the commercial element of FGM ripples beyond the initial cutting. Many girls who suffer the *intended* effects of FGM—to say nothing of those who suffer medical and psychological complications—have no choice but to engage in further commercial activity to undo those harms. This is particularly true of women who have suffered infibulation, who must seek further surgical intervention to restore their ability to engage in such basic functions as menstruation, intercourse and childbirth. But other victims, too, will seek medical or psychological help to cope with or undo the effects of FGM. The commercial element of FGM is thus not limited to the act itself: "[i]t also includes the procedure of re-infibulation" and related procedures "at any time in a woman's life."[51]

All of these elements—the payment to the cutters, the subsequent medical care for the victims, and the increased bride price—make FGM an inherently commercial activity.[52] It is, therefore, one that Congress is empowered to regulate.[53]

II. Because FGM is a form of enslavement that offends core values enshrined in U.S.-ratified treaties, Congress also drew authority to enact Section 116 from the Treaty Clause.

Article II, Section 2 of the U.S. Constitution provides that treaties with foreign countries become binding on the United States following ratification by the Senate. U.S. Const., art. II, § 2, cl. 2; *Medellin v. Texas*, 552 U.S. 491, 504-05 (2008). Once a treaty is ratified, Congress may pass legislation to implement its terms, and "[i]f the treaty is valid there can be no dispute about the validity of [such] statute . . . as a necessary and proper means to execute the powers of the

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[51] http://www.who.int/reproductivehealth/publications/health-care-girls-women-living-with-FGM/en/

[52] In the alternative, at the very least, FGM has a substantial effect on interstate commerce, such that Congress has a rational basis to regulate it. *See Gonzales v. Raich*, 545 U.S. 1, 22, 125 S. Ct. 2195, 2209 (2005).

[53] These facts demonstrate that there is no merit to Defendants' claim that "FGM is not an economic or commercial activity." *See* Defs. Br., D.I. 307, at 47. Defendants' arguments to the contrary are unavailing, as they rely on cases that have no ostensible relationship with commerce or interstate activity. *See* Defs. Br. at 33-55 (relying on *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740 (2000), which struck down legislation regulating generic violence against women, and *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624 (1995), which struck down legislation regulating mere possession of firearms within school zones).

Government." *Missouri v. Holland*, 252 U.S. 416, 432 (1920). Moreover, to be constitutional, such legislation must only be "rationally related" to the treaty, meaning that it is "'convenient, or useful or conducive.'" *United States v. Belfast*, 611 F.3d 783, 804 (11th Cir. 2010) (quoting *United States v. Comstock*, 560 U.S. 126, 133-34 (2010)); *see also United States v. Wang Kun Lue*, 134 F.3d 79, 84 (2d Cir. 1998).

Here, a series of anti-slavery conventions and the ICCPR, all of which have been ratified by the United States Senate, empowered Congress to enact Section 116.

A. FGM is a form of slavery that defies the anti-slavery conventions ratified by the United States Senate.

On March 21, 1929, the United States Senate ratified the Convention to Suppress the Slave Trade and Slavery of 1926 (the "Slavery Convention"). This act was followed on December 6, 1967, with the Senate's ratification of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956 (the "Supplementary Convention" and with the Slavery Convention, the "Anti-Slavery Treaties"). Together, the Anti-Slavery Treaties marked a firm commitment to eradicate slavery and practices "similar to slavery" wherever they appeared.[54]

At the heart of the Anti-Slavery Treaties lies the mandate to "bring about, progressively and as soon as possible, the complete abolition of slavery *in all its forms*" (emphasis added).[55] This language tracks authority granted to Congress under the Thirteenth Amendment to "determine what are the badges and the incidents of slavery, and . . . translate that determination into effective legislation." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440, 88 S. Ct. 2186, 2204 (1968). While not determinative of Congress's power to act under the Anti-Slavery

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[54] Supplementary Convention, Preamble, Sept. 7, 1956, 226 U.N.T.S. 3.

[55] Slavery Convention, Preamble, 60 L.N.T.S. 253 (1926) (emphasis added).

Treaties, Congress's authority under the Thirteenth Amendment is instructive. As the Supreme Court has held, "badges and incidents of slavery" can take many forms, including private actions displaying "class-based, invidiously discriminatory animus . . . aim[ed] at a deprivation of the equal enjoyment of rights secured by the law to all." *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S. Ct. 1790, 1798 (1971). In other words, the Supreme Court has held that "forms" of slavery need not be literal enslavement, nor must they be perpetrated by state actors. This Thirteenth Amendment jurisprudence accords with the Anti-Slavery Treaties, which identify the most common "form" of slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[56] And the effort to control and claim ownership over women is the hallmark of FGM.

First, as noted above, FGM is often used to increase the victim's value as property to be sold to her husband. In altering the victim's body to procure the highest marriage price, FGM treats the victim not as a human being, but as chattel. Such treatment is, definitionally, a "form of slavery." *Second*, FGM permanently disfigures the victim's body, marking her as "fixed." Such physical branding—a literal "badge of slavery"—is the indelible signature of bondage. *Third*, as the Supreme Court has recognized, ownership of property is characterized primarily by the right to exercise control over such property and exclude others from its enjoyment. *See Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S. Ct. 383, 391 (1979). The primary purpose of FGM is to control a woman's sexuality by removing her ability to enjoy sexual intercourse. As noted above, that lack of enjoyment is meant to increase the victim's chastity and virtue—in other words, to keep her faithful to her husband. FGM thus robs victims of their bodily integrity, autonomy and self-determination. In other words, it turns them into slaves.

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[56] Slavery Convention, Art. 1.1, 60 L.N.T.S. 253 (1926) (emphasis added).

If there were any doubt as to the applicability of the Anti-Slavery Treaties to FGM, it is dispelled by Article 5 of the Supplementary Convention, which provides, in pertinent part, that "the act of mutilating, branding or otherwise marking a slave or a person *of servile status* in order to indicate his status, or as a punishment, *or for any other reason* . . . shall be a criminal offence under the laws of the States Parties to this Convention" (emphasis added).[57] This broad language plainly covers FGM—a practice that brands women as sexually subservient to their husbands.[58]

FGM is thus a clear "badge of slavery," or, at minimum, a practice "similar to slavery," prohibited by both Anti-Slavery Treaties. Congress, having ratified these treaties, was entitled to enforce them through Section 116 and ban FGM.

B. Congress was also authorized to pass Section 116 under the ICCPR's prohibition against sex-based violence.

The ICCPR was ratified by the United States on June 8, 1992. The ICCPR is not self-executing, and may therefore be effectuated by Congress through appropriate, constitutionally permissible legislation. Article 2(2) of the ICCPR gives the following mandate: "Where not already provided for by existing legislat[ion] . . . each [party] to the [ICCPR] undertakes to take the necessary steps . . . to adopt such laws or other measures as may be necessary to give effect to the rights recognized [herein]."[59] That is precisely what Section 116 does.

Article 24 of the ICCPR provides, in pertinent part, "Every child shall have, without any discrimination as to . . . sex . . . the right to such measures of protection as are required by his

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57 Supplementary Convention, Art. 5, Sept. 7, 1956, 226 U.N.T.S. 3.

58 Article 5 of the Supplementary Convention applies to "countr[ies] where the abolition or abandonment of slavery, or of the institutions or practices mentioned in article 1 of this Convention, is not yet complete." Supplementary Convention, Article 5. "[I]nstitutions and practices mentioned in Article 1" include "[a] woman, without the right to refuse, [being] promised or given in marriage on payment of a consideration in money or in kind to her parents" and "[t]he husband of a woman, his family, or his clan, [having] the right to transfer her to another person for value received or otherwise." Supplementary Convention, Article 1. As discussed above, all of these conditions exist in the communities that practice FGM. In fact, they are, in many cases, the very reason FGM is performed. *See* Section I.B., *supra*.

59 ICCPR, Art. 2(2), Dec. 16, 1966, 999 U. N. T. S. 171.

status as a minor, on the part of his family, society and the State."[60] As discussed above, FGM denies children this right by inflicting on them life-altering violence on the basis of their sex. Accordingly, Section 116 is a facially valid means of effectuating the United States' commitment under ICCPR Article 24 to protect children from sex-based violence.[61]

Defendants offer two arguments as to why Congress could not rely on Article 24 of the ICCPR in enacting Section 116. Neither has merit.

First, Defendants point to a reservation Congress placed on ICCPR Article 7, limiting the enforcement of Article 7 to acts committed by state entities. *See* S. Exec. Rep. No. 102-23, at 7, 12 (1992) (limiting the application of Article 7 to "cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments"); Defs. Br. at 28-29 ("a private individual cannot deprive another of a right secured by the Fifth, Eighth or Fourteenth Amendments"). But regardless of whether Defendant's argument has any merit as to Article 7, it has no bearing on Article 24. Not only does Article 24 have no equivalent reservation, but Defendants' argument only shows that if the Senate wanted to place a similar restriction on Article 24, it knew how to do so. Nor does the language of Article 24, which contemplates acts by an individual's "family," allow for such a limitation absent clear Congressional expression.

Second, Defendants claim that Section 116 breaches a general clarification Congress made regarding the ICCPR, which provides that any statute effectuating the ICCPR should not "alter the constitutional balance of authority between the State and Federal governments." *See* S. Exec. Rep. No. 102-23, at 18 (1992); Defs. Br. at 31. Defendants' argument presupposes that

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[60] ICCPR, Art. 24, Dec. 16, 1966, 999 U. N. T. S. 171.

[61] The ICCPR also grants protection against sex-based violence to all women, regardless of age. *See, e.g.*, ICCPR, Art. 2.1, Dec. 16, 1966, 999 U. N. T. S. 171; ICCPR, Art. 26, Dec. 16, 1966, 999 U. N. T. S. 171.

Congress's treaty power is constitutionally limited to matters not under states' jurisdiction, and Section 116 exceeds such limitation. Defendants are wrong on both counts.

The plain language of Article II, Section 2 of the Constitution places no limitations on Congress's treaty power. For that reason, the Supreme Court has consistently refused to read such limitations into Article II, Section 2. At most, the Supreme Court has intimated, in *dicta*, that treaty-implementing legislation may be disfavored where "no apparent interests of the United States Congress or the community of nations" are involved. *See Bond v. United States*, 134 S. Ct. 2077, 2093 (2014).

Here, there is no doubt that FGM is a grave concern to the community of nations. As evidence, one need only look to the myriad international conventions—many of which the United States is a party to—aimed at eradicating FGM:

- The United Nations committee responsible for implementing the Convention on the Elimination of All Forms of Discrimination Against Women (the "CEDAW") has stated that FGM is a form of violence against women and girls that causes severe health and other adverse consequences. Accordingly, the committee has recommended that all state parties take necessary measures to eradicate the practice of FGM.[62] The United States signed the CEDAW on July 17, 1980.

- The Convention on the Rights of the Child, 1989 ("CRC") mandates that governments abolish "traditional practices prejudicial to the health of children."[63] The United States signed the CRC on February 16, 1995.

- The Concluding Observations of the Committee on the CRC: Sudan (1993) explicitly directs governments to enact legislation that will abolish the practice of FGM, defining such practice as a violation of children's rights.[64]

- On May 12, 1993 the World Health Organization, with the support of the United States, adopted a resolution emphasizing the need to eliminate harmful traditional practices affecting the health of women and children. This resolution explicitly

62 Convention on the Elimination of All Forms of Discrimination against Women, 1249 U.N.T.S. 13 (1979).

63 Convention on the Rights of the Child, 1577 U.N.T.S. 3 (1989).

64 Committee on the Rights of the Child, CRC/C/15/Add. 10 (18 October 1993).

cited FGM as a practice restricting "the attainment of the goals of health, development, and human rights for all members of society."[65]

- In 1993, the Vienna Declaration of the World Conference on Human Rights held that FGM constitutes an egregious international human rights violation.[66]

Furthermore, even if the treaty power were constitutionally limited in the way Defendants suggest (and it is not), Section 116 does not alter the constitutional balance of authority between the State and Federal governments. In *United States v. Wang Kun Lue*, a case virtually on all fours with the present facts, the Court of Appeals for the Second Circuit examined a conviction under a federal statute criminalizing hostage-taking, 18 U.S.C. §1203, which had been enacted in furtherance of the International Convention Against the Taking of Hostages, Dec. 18, 1979, T.I.A.S. No. 11,081 (the "Hostage-Taking Convention"). *United States v. Wang Kun Lue*, 134 F.3d 79 (2d Cir. 1997). The defendant in *Lue* argued that the federal statute under which he was convicted "must be struck down because it impermissibly invades the authority of the states in violation of the Tenth Amendment." *United States v. Wang Kun Lue*, 134 F.3d at 84. The Second Circuit disagreed. It noted that, while the Tenth Amendment preserves certain powers to the States, matters of "important international interest" remain suitable subjects for legislation by Congress. *Lue* at 85. Finding that hostage-taking constitutes a "grave concern to the international community," the Second Circuit upheld Congress's right to give legislative effect to the Hostage-Taking Convention and affirmed defendant's conviction. *Lue* at 87.[67]

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65 Forty-Sixth World Health Assembly, WHA46/1993/REC/3 (14 May 1993).

66 Vienna Declaration, World Conference on Human Rights, Vienna, 14-25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993).

67 As the Second Circuit has recognized, *Missouri v. Holland*, which Defendants also purport to rely on, is "not to the contrary." *See United States v. Wang Kun Lue* at 85 (citing *Holland* for the proposition that when "an important national interest [is] at stake . . . no invisible radiation from the general terms of the Tenth Amendment would require invalidation of" a Congressional act defending that interest).

The long list of international treaties and resolutions listed above leaves no doubt that FGM is a matter of "grave international concern" within the meaning of *Lue*. Accordingly, Congress acted with authority under ICCPR Articles 2(2) and 24 in enacting Section 116.

CONCLUSION

For the foregoing reasons, a*micus curiae* AHA Foundation urges this Court to hold that Congress had the constitutional authority to enact Section 116 and deny *Defendants' Motion to Dismiss Counts One, Two, Three, Four and Five of the Indictment*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2018, I electronically filed the foregoing document with the Clerk of Court using the ECF system, which will send notification of such filing to all parties in this case. The foregoing document was also sent to all parties in this case via email.

s/ Mark Franke
Mark Franke